(2) the plaintiff has had a four-month headstart over the defendant, as a consequence of its having obtained an *ex parte* injunction. As against that, I am unable to find any factor in favour of the plaintiff.

Accordingly the plaintiff's application is dismissed. Costs in the cause.

Application dismissed.

Solicitors: *A.C. Fergusson; Madhavan Louis and Bath.*

A **BRUNEI REPORT**

TAN KEE TAI v. PUBLIC PROSECUTOR

[A.Cr.J. (Macdougall J.) May 28, 1987]

[Bandar Seri Begawan – Criminal Appeal No. 4/87]

B *Customs and Excise – "Amount of the duty" in subsection 91(i) of section 126 – Meaning of – Customs Act (Cap. 36), s.126(91)(i).*

The appellant pleaded guilty to two offences under section 126(1)(g) of the Customs Act (Cap. 36) of being knowingly concerned in fraudulent evasions of customs duty on C March 13 and May 13, 1986.

The duty evaded in respect of the two charges to which the appellant pleaded guilty was $1,500 and $128.

The penalty provision in section 126 that is relevant to the offence committed by the appellant appears in subsec- D tion (91)(i) and reads as follows.

"Penalty –

(i) in the case of uncustomed goods, such goods being dutiable goods, be liable for the first offence to a fine of not less than 6 times the amount of the duty or $40,000 E whichever is the lesser amount, and of not more than 20 times the amount of duty or $40,000 whichever is the greater amount and for the second or any subsequent offence to imprisonment for a term of 2 years.

Provided that when the amount of duty cannot be ascertained the penalty may amount to a fine of $40,000."

F The Magistrate fined the appellant $20,000 on the first charge and $8,000 on the second charge. He ordered that the appellant serve six months' imprisonment in default of payment of the fine in each instance.

The appellant contended that the fines were excessive in that the Magistrate calculated them on a wrong basis. G An examination of the record shows that in calculating the minimum amount of the fine in each instance, the Magistrate applied a multiplier of 6 to the amount of duty assessed and not to the amount of duty evaded. The appellant submitted that in order to arrive at the minimum and maximum figures on which the fine is to be assessed, a court is obliged to apply the multipliers 6 and 20 to the amount of H duty evaded.

Held, allowing the appeal: (1) "the amount of the duty" referred to in the penalty provision in subsection (91)(i) must refer to the duty evaded or attempted to be evaded and not to the total amount of the duty assessed on the goods in question;

I (2) the fines imposed by the learned Magistrate were set aside. Fines of $15,000 and $1,300, in default four months and one month of imprisonment respectively, were imposed.

Cases referred to:

(1) *Wong Ngian Thin* v. *Public Prosecutor* [1941] M.L.J. 164.

(2) *Sioe Yew Hing* v. *Public Prosecutor* Criminal Appeal No. 97 of 1973.
(3) *Liew Sai Wah* v. *Public Prosecutor* [1968] 2 All E.R. 738, at 741; [1968] 2 M.L.J.1 at p.2.
(4) *London & North Eastern Ry Co.* v. *Berriman* [1946] A.C. 278, at 313.
(5) *Rex* v. *Chapman* [1931] 2 K.B. 606, at 609.
(6) *R.* v. *Bloxham* [1982] 1 All E.R. 582.

CRIMINAL APPEAL.

Daljit Singh Sandhu for the appellant.
Ahmad Zakaria (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Macdougall J.: The appellant pleaded guilty to two offences against section 126(1)(g) of the Customs Act (Cap. 36) of being knowingly concerned in fraudulent evasions of customs duty on March 13 and May 13, 1986 and asked that three other offences of the same nature committed on March 4, June 5 and October 23, 1985 be taken into account.

The penalty provision in section 126 that is relevant to the offences committed by the appellant appears in sub-section (91)(i) and reads as follows:

"Penalty –

(i) in the case of uncustomed goods, such goods being dutiable goods, be liable for the first offence to a fine of not less than 6 times the amount of the duty or $40,000, whichever is the lesser amount, and of not more than 20 times the amount of duty or $40,000/= whichever is the greater amount and for the second or any subsequent offence to imprisonment for a term of 2 years:

Provided that when the amount of duty cannot be ascertained the penalty may amount to a fine of $40,000/=;"

The duty evaded in respect of the two charges to which the appellant pleaded guilty was $1,500 and $128, and that evaded in respect of the three charges taken into account was $528, $772 and $1,517.

The magistrate fined the appellant $20,000 on the 1st charge and $8,000/= on the second charge. He ordered that the appellant serve six months imprisonment in default of payment of the fine in each instance.

The appellant contends that the fines were excessive in that the magistrate calculated them on a wrong basis. An examination of the record shows that in calculating the minimum amount of the fine in each instance the magistrate applied a multiplier of 6 to the amount of duty assessed and not to the amount of duty evaded. For the first fine he thus arrived at a lower figure of $13,862.10 and a higher figure of $46,207, and for the second fine a lower figure of $3,198 and a higher figure of $10,660.

Had he calculated on the basis of the amount of duty evaded, the minimum and maximum figures would have been $9,000.00 and $30,000 respectively for the first fine, and $768 and $2,560 respectively for the second fine.

Mr. Sandhu for the appellant submitted that in order to arrive at the minimum and maximum figures on which the fine is to be assessed, a court is obliged to apply the multipliers 6 and 20 to the amount of duty evaded.

In support of his contention he cited *Wong Ngian Thin* v. *Public Prosecutor*[1] a case concerned with a provision in the corresponding legislation of Malaysia that is in all material respects the same as section 126. In his judgment, Cussen J. had this to say at page 205.

"The section provides for the fine being calculated as a multiple of the duty, *i.e.* from six to twenty times. In so calculating the fine, the Magistrate took the amount of the total duty. That I think is wrong – the words "amount of duty" mean the "amount of the duty evaded," *i.e.* the difference between the duty calculated on the true values, *etc.*, and the duty actually paid."

It is perfectly true that Cussen J. did not give any reason for the conclusion he reached, but in my respectful view he was entirely correct. It seems likely that he considered the position to be so obvious that it did not require explanation.

Mr. Sandhu also very properly drew my attention to the *dicta* in *Sioe Yew Hing* v. *Public Prosecutor*,[2] in the High Court in Borneo which conflict with the view expressed by Cussen J. Again, the legislation with which the court was concerned is not materially different from section 126.

At page 11 of the transcript of that appeal Tan Chiaw Thong J. expressed the following opinion:

"However, reading the provisions of section 135(1)(g) and section 135(1)(i) closely, it would appear that the "customs duty" referred to must mean the customs duty involved or chargeable, as distinct from the customs duty evaded or attempted to be evaded. If the legislature had in-

tended that any customs duty which has been paid in connection with the fraudulent transaction must, as a matter of law, be deducted – in other words, that "customs duty" particularly in the penalty provisions, means the customs duty which has actually been fraudulently evaded or in respect of which an attempt has been made to fraudulently evade it, it would have stated so expressly. In coming to this conclusion, I am not unmindful of the principle that penal provisions in a statute should be strictly construed."

Section 126(1)(g) states:

"126(1) Whoever –

(g) is in any way knowingly concerned in any fraudulent evasion or attempt at fraudulent evasion of any customs duty, or in evasion or attempt at evasion of any prohibition of import or export;

shall be guilty of an offence."

The customs duty there referred to is clearly that which the offender evades or attempts to evade. It follows that "the amount of the duty" referred to in the penalty provision subsection (91)(i) must refer to that duty and not to the total amount of duty assessed on the goods in question. I do not find any ambiguity in the section.

With the greatest respect I am unable to agree with Tan Chiaw Thong J. that if the legislature had intended that the fine be calculated on the prescribed multiples of the amount of duty actually fraudulently evaded, it would have stated so expressly. If that reasoning be correct, and if the legislature had intended that the calculation be made on the basis of the total amount of duty assessed rather than on that fraudulently evaded, it is equally legitimate to argue that it would likewise have stated so in express terms.

Moreover, if the construction which Tan Chiaw Thong J. favours is correct, then it seems to me that absurd results could ensue. For example, a man who fraudulently evades $10 duty in respect of goods assessed for duty in the sum of $100,000, would thus be liable to pay a minimum fine of $40,000 for his first offence. I do not believe that the legislature ever intended that this should be the law.

Mr. Sandhu further submitted that even if, contrary to what I have found, the section is ambiguous, it must be construed in favour of the appellant. He cited the well established principle succinctly stated as follows in paragraph 910 of page 560 of the 4th edition of *Halsbury's* Laws of England:

"Construction of penal statutes. It is a general rule that penal enactments are to be construed strictly, and not extended beyond their clear meaning. This general rule means no more than that if, after the ordinary rules of construction have first been applied, as they must be, there remains any doubt or ambiguity, the person against whom the penalty is sought to be enforced is entitled to the benefit of the doubt."

Viscount Dilhorne cited this passage with approval in the Privy Council decision *Liew Sai Wah* v. *Public Prosecutor.*[3] His Lordship also expressed his approval of the following words of Lord Simonds in *London & North Eastern Ry. Co.* v. *Berriman:*[4]

"A man is not to be put in peril upon an ambiguity, however much or little the Act appeals to the predilection of the court."

Lord Hewart C.J. in *Rex* v. *Chapman*[5] placed reliance on the following passage in *Maxwell* on the Interpretation of Statutes:

"Where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the Legislature which has failed to explain itself."

In my view this passage underlines the fallacy in the reasoning of Tan Chiaw Thong J. that because the legislature had not expressly stated that the duty referred to is the duty evaded it must have meant the total amount of duty assessed.

Finally, in the relatively recent decision of the House of Lords in *R.* v. *Bloxham*[6] Lord Bridge observed at page 585:

"As a general rule, ambiguities in a criminal statute are to be resolved in favour of the subject, sc in favour of the narrower rather than the wider operation of an ambiguous penal provision."

Counsel who appeared on behalf of the Public Prosecutor readily conceded, as he must, that the principle embodied in the cases I have referred to is applicable to the interpretation of section 126. He submitted, however, that the wording of the section plainly indicates that the word "duty" in subsection (91)(i) means the total amount of duty assessed on the goods.

It follows from what I have already said, however, that I do not agree with this submission. In my view paragraphs (g) and (i) when read together clearly convey the meaning that "the amount of the duty" referred to in paragraph (i) is the

duty that the offender has fraudulently evaded or has attempted fraudulently to evade. Accordingly I allow this appeal and set aside the fines imposed by the magistrate.

Taking into consideration the total amount of duty evaded and the fact that the appellant has already sold the goods in respect of which he evaded the duty, and has thus illegally enriched himself, I consider that the appropriate fines should be determined by applying a multiplier of 10 to the amount of duty stated to have been evaded in the two charges to which he pleaded guilty.

I therefore substitute fines of $15,000 and $1,300 for those I have set aside and order that in default of payment the appellant serves terms of imprisonment of four months and one month respectively.

Appeal allowed.

Solicitors: *Sandhu & Co.*

A MALAYSIAN REPORTS

PUBLIC PROSECUTOR v. ORHAN OLMEZ

[S.C. (Salleh Abas L.P., Hashim Yeop A. Sani & Abdoolcader S.C.JJ.) March 3 & April 22, 1987]

B **[Kuala Lumpur – Supreme Court Criminal Application No. 3 of 1987]**

Public International Law – Diplomatic immunity – Diplomatic agent allowed to give evidence solely for authentication of legal documents in an extradition enquiry – Whether this constitutes waiver of immunity from jurisdiction – Diplomatic Privileges (Vienna Convention) Act, 1966.

C

Diplomatic Privileges – Immunity – Diplomat allowed to give evidence "solely for authentication of legal documents" – Whether constitutes waiver of immunity – Vienna Convention.

D

Criminal Procedure – Subpoena to diplomatic agent – Warrant of arrest – Inviolability of diplomatic agent – Vienna Convention, arts. 29 & 31(2)

In this case the First Secretary to the Embassy of Turkey gave evidence in court in an extradition proceeding in the Magistrate's Court in Kuala Lumpur. His attend-
E ance was preceded by a diplomatic note from his Embassy the gist of which was that he would be present during the hearing of the proceeding "in his capacity as consul" and "solely for the authentication of legal documents." It was made clear in the note that he would reply "only to questions pertaining to the authentication" and would refrain from answering any other questions. During the course of
F the cross-examination a question arose as to the correctness of the translation of certain documents sent by the Turkish Government. The hearing was adjourned apparently to enable the First Secretary to identify the translation with the right documents. However on the same day, the Turkish Embassy sent another diplomatic note to the Ministry of Foreign Affairs to say that the First Secretary will not be
G attending court any more. Counsel for the respondent applied to the court to issue a warrant of arrest to compel the attendance of the First Secretary. The learned Magistrate refused the application. Counsel then wrote to the High Court to apply for a revision of the ruling of the learned Magistrate. The learned Judge after hearing arguments in open court exercised his power of revision and ordered that a subpoena be issued for the attendance of the
H First Secretary. The learned Judge also ruled that in the event of his failure to attend court on the date specified in the subpoena a warrant of arrest would be issued against him. The Public Prosecutor applied to the Supreme Court to refer certain questions to the court, the main question being – "Whether or not the learned Judge was right in law to hold that the act of the sending state allowing the
I diplomatic agent to give evidence solely for authentication of the legal documents in an extradition enquiry constitutes a waiver of immunity from jurisdiction under Article 32 of the Schedule to the Diplomatic Privileges (Vienna Convention) Act, 1966."

Held: (1) a waiver under the Vienna Convention must always be express. The restrictive language in the first